

PUBLIC LAW BOARD NO. 7120

(BROTHERHOOD OF MAINTENANCE OF WAY
PARTIES TO DISPUTE: (EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated December 30, 2009, R. G. Parrish, Engineer of Track, instructed J. A. Jones (hereinafter "the Claimant") to attend a formal Investigation on January 12, 2010, in the CSX Engineering Office in Rocky Mount, North Carolina, in connection with the December 19, 2009, derailment of a train on the W and W subdivision. The letter stated:

This train was pulling into the siding at Rose Hill with 128 loads of grain and derailed the 21st through 25th cars, due to an excessively worn switch point. The car damage was estimated at \$85,600 and track damage at \$2000. You had previously performed a routine inspection on this portion of track December 14, 2009, and conducted a monthly turnout inspection on December 7, 2009, but failed to recognize or protect this defect that caused the derailment.

The Engineer of Track charged the Claimant "with failure to promptly and by the quickest means report defects in tracks and unusual conditions that may affect the safe, and efficient operation of the railroad, carelessness or incompetence in the performance of your duties as a track inspector and failure to perform your assigned duties in the most efficient manner, consistent with safety." General Rule F of the CSX Transportation Operating Rules and MWI 105-08 Part I, section A were cited as having been possibly violated by the Claimant's conduct. The hearing was subsequently rescheduled to January 26, 2010.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The derailment in connection with which the Claimant was charged occurred at approximately 2:30 a.m. on December 19, 2009, at milepost AC 200.3 in the W and W subdivision near the NE Rose Hill turnout. The train that derailed consisted of 128 cars. The Carrier's plan was to place 64 cars on the siding, leaving 64 on the main track. The 64 cars on the main track would then be pulled down to another location. In pulling into the siding the 21st through 25th cars derailed. The last of the cars was re-railed at 1430 hours, and at 1700 hours the main line was back in service. The siding was kept out of service for about another week because of weather issues and the holiday. Engineer of Track Parrish testified that the estimated damage to the equipment was \$86,000, and to the track, \$2,000.

A team was put together to investigate the cause of the derailment consisting of Engineer of Track Parrish, then Roadmaster J. F. Earp, Trainmaster Donald Joyner, and Mechanical Supervisor Monty Anderson. The team concluded, Mr. Parrish testified, that the derailment was caused by an excessively worn switch. He described the basis for that conclusion as follows:

We looked at all the cars, looked at all the track. We looked at the download on the engine which showed approximately 7 mile[s] an hour. We looked at the wheels. There was one set of wheels that we could not find which was buried up

under a car. Upon looking at the track we come across the switch point which was gapped approximately a quarter of an inch. On the top of the switch point you could see a blunt mark to where the wheel hit on top of the point and rode the switch point and then got behind the switch point which went down to the Cause Code of T314, which is switch point worn or broken.

The train, Engineer of Track Parrish testified, was going through the turnout into the siding.

The FRA frequency index for inspection of that portion of track, Mr. Parrish stated, is once a week plus a monthly inspection of switches. CSX, on its own initiative, inspects the track twice a week, with an additional monthly switch inspection. Also, during cold weather, below 32 degrees Fahrenheit, and in very hot weather CSX does additional inspections to look for broken rail.

During the monthly switch inspection, Mr. Parrish stated, the inspector inspects all of the components in the turnout to see if they are loosened, worn, or broken. He throws the switch to check the switch adjustment and to make sure that it is properly fitting on the reverse side. He also checks the frog, the frog bolts, the guard rail, and heel block to assure that there are no loose or worn parts. During the twice-weekly inspections, the inspector does not stop and walk turnouts.

The Claimant performed a walking switch inspection of the turnout at Northeast Rose Hill AC Milepost 200.3 on December 7, 2009. He reported no defect with regard to that switch. He did report defects found at two turnout crossings: SE Dudley at Milepost 168.90 (replaced cotter pins) and NE Case Farms at Milepost 175 (tightened guard rail bolts). The Claimant's Official Report of the inspection was approved by Roadmaster Earp on December 18, 2009.

Engineer of Track Parrish identified a page from the FRA Track Safety Standards Compliance Manual dealing with the inspection of switches. He noted that one of the

provisions in the Manual stated, “Unusually chipped or worn switch points shall be repaired or replaced. Metal flow shall be removed to insure proper closure.” Mr. Parrish also cited General Rule F which states that defects in track “must be reported promptly” and MWI 105-08, Instruction for Track Inspection, that states, “. . . Any condition found during inspection that would endanger the safe passage of trains at authorized speeds must either be corrected immediately or protected by temporary speed restriction, flagging, or removal from service until repaired.” The remedial action that should have been taken at the derailment site for a condition of the switch points such as he discovered at the derailment site on December 19, 2009, Mr. Parrish testified, would have been to weld the switch points, take the switch out of service, or replace the switch points.

The Claimant performed a routine weekly inspection on the same portion of track on December 14, 2009, and did not report any defect. The Claimant then went on vacation and was off work on the date of the derailment, December 19, 2009. Another track inspector, Scott Damson, conducted cold weather inspections of the same track on December 17 and 18, 2009, and did not report any defect.

On cross-examination Engineer of Track Parrish testified that there was different size track on the stock rail and the switch rail. The size of the stock rail both coming up to the switch and leading off from it was 132 pounds per yard, and the switch rail, 100 pounds per yard. The reason for the different size track was that in January, 2009, the stock rail was replaced by the heavier track, and the switches were waiting to be replaced.

Mr. Parrish was asked if he held anyone responsible for the derailment other than the Claimant. He stated, “No sir, he was the last one that did the switch inspection.” The Organization representative then asked Mr. Parrish, “So, if there was something wrong with the switch, why wouldn’t . . . the train derail on the 8th, 9th, the 10th, the 11th, 12th,

13th, 14th, 15th, the 16th, the 17th and on the 18th of December?” Mr. Parrish stated, “That I cannot answer.”

John Earp, who was Roadmaster at Selma, North Carolina, at the time of the derailment and has 31 years of service with the Carrier in the track department, was a member of the cause finding team. All members of the team agreed that an unusually worn switch point was the cause of the derailment, he stated. A worn switch can be observed through track inspection, he testified. Asked, “Would you consider that derailment being a failure in the track inspection process?” Mr. Earp testified, “No, not really. Unusually worn switch point is fitting up tight, shouldn’t cause a derailment. It can still be worn and still be fitting up.” Questioned, “Is an unusually worn switch point a FRA type defect?” he stated, “Yes.”

Mr. Earp was shown photographs of the turnout track and asked whether the stock rail at the location had any metal overflow. He stated that “according to the pictures it looks like it does have some overflow.” He was asked whether the metal overflow on a stock rail could cause any problems with the switch point. He answered, “If your points start hitting up under the flow, no. If it is not fitting properly, the flow could cause it to gap.” The following colloquy then occurred between the hearing officer and Mr. Earp:

H. O. : If you have an unusually worn switch point as defined by the FRA, what remedial action should be taken concerning that switch point?

Earp: That switch point should be built up by the welder and grinded down to make the proper fit.

H. O. : What would be the immediate remedial action?

Earp: The immediate remedial action would be to try to shim it up or Slow Order it.

H. O. : What is the speed of the turnout at the north end of Rose Hill?

Earp: 10 MPH.

H. O. In the case of Rose Hill, north end, what would be the proper remedial action?

Earp: 10 MPH that switch point should have been good for 10.

H. O. : The team did agree that that was the cause of the derailment. In that case, what would have been the remedial action that day?

Earp: Should have been taken out of service or removed.

H. O. : Okay. Does Mr. Jones have enough experience and/or training as a track inspector to find defects like this one, such as a worn switch point?

Earp: Yes sir, absolutely.

On cross-examination Mr. Earp was asked by the Organization representative whether it was not true that a worn switch point that faced up well to its stock rail so that there was no gap would be safe to operate. He answered, "Yes sir." He was asked, "Is there any reason to believe that Mr. Jones would have seen an unusually worn switch point and not advise you?" He stated, "No sir, he's real good about passing on conditions."

On redirect examination the hearing officer asked Mr. Earp how many trains per day operate in the area where the derailment occurred. He answered, "I know of one locally that works it every day and then grain trains as needed, some days maybe two, three depends on the grain trains. . . ." The hearing officer then asked, "Okay, so about two train movements a day over the switch?" Mr. Earp stated, "Yes sir." Regarding entering the switch to go into the siding, Mr. Earp testified that a grain train would

probably want to use the siding, that there was also a company located in the siding, and that the local train would go into the siding to deliver cars there.

The hearing officer asked Mr. Earp on redirect examination whether it was “possible that a wheel could climb up on an unusually worn switch point and go between the switch point and the stock rail if it’s worn that bad?” He answered, “Yes sir.”

In response to questions by the Organization representative Mr. Earp testified that there are situations where the train conductor would also be required to throw the switch. He added that “if he goes into the switch the Conductor is supposed to visually inspect the switch point before entering the switch.” The Organization representative followed up, “Is the Conductor also not required to make sure the switch point is facing up before he would traverse over the switch?” Mr. Earp answered, “Yes sir he is.”

Scott Damson, Assistant Foreman in Selma and a qualified track inspector, testified that he did a cold weather visual inspection of the switch in question on Thursday, December 17th as he drove over the switch and that “it looked fine as I drove up to it and proceeded over it.” He did not get out and throw the switch.

Mr. Damson was at the rail site on the day of the derailment, Saturday, December 19, 2009. He prepared the following written statement, which he read into the record at the hearing:

Being called out to the derailment site at the AC 200.3 on Saturday December 19th, 2009, I was able to see and take some pictures of the derailment. It was agreed upon at first that the rail broke on both the east and west rail at the point where the rail weight went from 100 pounds to 132 pounds, in the middle of the turnout on this cold day. It was somewhere around the temperature of 25 degrees and as you can see on the video from the engine that the Conductor checked the switch before and after he threw the switch and made sure the switch points fit up tightly, it was then that two six axle engines went into this turnout along with 20 cars before [the train] derailed. There was three of us there at the switch point with a car straddling the switch point, i.e. weight of the car when we checked it. At this point the switch was still fitting up tightly, therefore there’s no way that this derailment was

caused by worn switch point.

The Hearing Officer asked Mr. Damson if he actually viewed the video that he mentioned in his statement. He stated that he did not view it, but that the person who downloaded the video “let us know that that’s what he observed and that if we wanted to look at it, we could, but at that point it was declined to look at the video.” If a conductor lines a switch, Mr. Damson testified, he is required to inspect the points to see if they fit up. He is required, Mr. Damson stated, to check that there are “[n]o obstructions and that the switch points fit up correctly.” He did not know, Mr. Samson stated, whether a conductor is qualified on the FRA track safety standards.

The hearing officer questioned Mr. Damson if there was any evidence to support his statement that the derailment occurred at the junction between the 132 pound and 100 pound rail. He stated that the track was “buried under dirt and ties and everything else,” both on the east and on the west rails.

The Claimant testified that he has 12 years of service with the Carrier and that he was track inspector in Goldsboro, North Carolina, from 2005 until he bid off to a force position after the derailment. In Goldsboro, he stated, he was responsible for track beginning at AC Milepost 139.0 to the end of AC Milepost 208.1 plus ten miles of track on the Clinton Spur from ACA Milepost 189 to 199. He was responsible, he testified, for around 68 mainline switches plus yards at Goldsboro and Warsaw, plus “all the industries and yard switches.” His responsibilities, he stated, were to make sure that the track was safe for the passage of trains and to recognize any defects in track components and to take remedial action such as a slow order, a minor repair, or taking the track out of service.

He conducted the monthly turnout inspection at the north end of Rose Hill at AC 200.3 on December 7, 2009, he testified. He handled the switch and threw it that day, he

stated, and did not notice any FRA defect in the turnout. He inspected the switch points going into the siding and the stock rail, he stated. There was no metal overflow on the stock rail that day, the Claimant testified, and the switch points were not unusually worn. He made no adjustments that day to the switch, he testified.

The hearing officer showed the Claimant the photographs taken the day of the derailment. The hearing officer commented, "It appears that there is some overflow on the stock rail and the switch point does have some wear on it, quite a bit of wear actually." He then asked the Claimant, "Does the wear on a switch point occur over long periods of time or does it occur suddenly or spontaneously." The Claimant answered, "No it, it was over a period of time." The hearing officer then asked, "How about the overflow on the stock rail?" The Claimant stated, "The overflow on the stock rail looking at this photo see where the point has actually receded from where it normally sits. Look[s] like maybe, just looking at the photo at least two inches where with the cold weather I guess and retracted so the side of the, where the recess from the stock rail." Asked what an overflow on a stock rail can cause, the Claimant stated that it can cause "maybe the flange pick it and ride up on it." Asked whether he considered the switch point in the picture an excessively worn switch point, the Claimant answered, "Not excessively worn." If he observed a switch point that was broken or worn to the point where it couldn't handle the normal transition of a wheel, the Claimant testified, he would take the switch out of service since he has no means of repairing it. In the past he has taken the north end of Rose Hill out of service, the Claimant stated, once for a guard rail problem and another time because of a defective switch point.

When he inspected the switch in December, the Claimant testified, the switch faced up properly and there was no unusual wear on the switch point. Weather changes

and the weight of a loaded train can make a switch contract, the Claimant stated.

The hearing officer recalled Engineer of Track Parrish to testify and asked him, “[W]hen the cause finding team established the point of derailment were these wheel marks, were the wheel marks at the switch point; is that how you determine[d] the point of derailment?” He answered, “Yes you could see where they had come at the switch point and right about 6 foot from the point on the inside, it fell off on the inside between the switch point and stock rail on the turnout side.” There was no indication, Mr. Parrish stated, that the derailment was caused by a broken rail where the 132 pound rail compromised to 100 pound rail. There was no evidence, he testified, that a broken rail caused the derailment.

On cross-examination Engineer of Track Parrish testified that three six-axle engines and 20 cars traversed the same portion of the rail on December 19th prior to the derailment.

In a closing statement the Claimant declared that he has been inspecting at the same location for at least five years and feels that he has the knowledge and know-how to make tracks safe for trains to pass. If there were any discrepancy that he felt would have caused a derailment, he stated, he thinks that he would have made the right decision. He will continue to make the right decision, he stated. Being brought up on a charge for something that occurred when he was not even there but on vacation is “kind of like a little slap in the face,” he asserted.

The Organization, in its closing statement, stresses the number of days between the December 7 switch inspection and the December 19 derailment and the number of trains that traversed the switch in that period and argues that there is no testimony that would support the charges that have been placed against the Claimant.

Following the close of hearing, by letter dated February 12, 2010, the Carrier notified the Claimant of the Carrier's determination "[a]fter a thorough review of the transcript . . . that the cause of the derailment was due to a worn switch point and that you failed to recognize or detect this condition during your December 7, 2009 turnout inspection." The letter supported the Carrier's determination that the failure to detect a worn switch point on December 7 caused the derailment on December 19, 2009, with the following reasoning:

It was pointed out that a switch point will wear out over long periods of time depending on the volume of car movements traversing the turnout side of the switch. It was also pointed out that a stock rail will acquire metal overflow over long periods of time. You had performed the last monthly turnout inspection at the NE Rose Hill and threw the switch to inspect the left hand switch point and stock rail on December 7, 2009. You did not taken [*sic* take] any exception to the worn switch point or overflow on the stock rail that should have been readily seen that day, as evident by the photographs taken on December 19, 2009, the day of the derailment. With very few or possibly no train movements through the turnout side of this switch between December 7, 2009 and December 19, 2009, the worn condition of the switch point and stock rail would not have changed much, if any, since you had performed your monthly turnout inspection. . . .

The discipline assessed was a five-day overhead suspension effective for 180 days from February 13, 2010, through August 9, 2010.

The deciding official's decision letter dated February 12, 2010, shows his awareness that the fact that the switch point may have been excessively worn on December 19, 2009, when the derailment occurred does not necessarily mean that it was excessively worn on December 7, 2009, when the Claimant inspected the switch. Thus the deciding official made a point of including in his letter the assertion that "[w]ith very few or possibly no train movements through the turnout side of this switch between December 7, 2009 and December 19, 2009, the worn condition of the switch point and stock rail would not have changed much, if any, since you had performed your monthly

turnout inspection.”

The record evidence, however, does not support the deciding official’s assertion that there were very few or no train movements through the turnout side of the switch during the relevant time period. Former Roadmaster Earp, in answer to the hearing officer’s question of how many train movements a day actually entered the switch going into the siding, testified without contradiction that “if you get a grain train they’re probably going to want to use it [the siding]” (Tr. 30). The Engineer of Track himself, when asked by the hearing officer what type of traffic, and approximately how much tonnage, ran through the W and W subdivision, testified that there was “[a] lot of grain.” He stated that “sometimes they average a grain train a day and an empty grain train coming out. Sometimes,” he continued, “they have . . . what they call a double barrel unit grain train which is 2 trains combined together. They have a lot of grain that goes down there. I think,” the Engineer of Track proceeded, “the tonnage is . . . I want to say . . . a million tons per year of grain.” (Tr. 7-8).

In addition to the grain traffic on the siding, Mr. Earp testified that there was also a company located there and that the local train that goes through the switch on a daily basis could go into the siding to deliver cars there. “There could be multiple movements,” Mr. Earp testified, “if he needs to get into that industry.”

Contrary to the assertion in the February 12, 2010, decision letter that there were very few or possibly no train movements through the turnout side of the switch, the record testimony established that there was probably a considerable amount of traffic through the turnout side of the switch between December 7 and December 19, 2009, including very heavy grain trains possibly on a daily basis. The record testimony thus undermines the foundation for the deciding official’s conclusion that “the worn condition of the switch

point and stock rail would not have changed much, if any, since [the Claimant] had performed [his] monthly turnout inspection.”

The decision letter is also inaccurate in its statement that “It was pointed out that a switch point will wear out over long periods of time” There is no testimony in the record that it takes “long” periods of time for a switch point to wear out. The question put to the Claimant by the hearing officer was, “Does the wear on a switch point occur over long periods of time or does it occur suddenly or spontaneously.” The Claimant answered, “No it, it was over a period of time.” (Tr. 40). Significantly, the Claimant did not say a “long” period, and no other witness testified that it required a long period of time. It would not be inconsistent with the record testimony to believe that it was possible for the switch points not to have been “unusually worn” on December 7, 2009, but to have deteriorated to that state on December 19, 2009, as the result of the amount of traffic, the amount of tonnage, and the below freezing weather that the turnout was subjected to in the interim period.

The decision letter also inaccurately states, “It was also pointed out that a stock rail will acquire metal overflow over long periods of time.” There is simply no testimony in the record so stating. The Claimant was asked by the hearing officer at page 40 of the transcript, “How about the overflow on the stock rail?” The question followed a previous question by the hearing officer of whether wear on a switch point occurs over a long period of time or suddenly. It is not clear, however, that the Claimant understood the question as referring to the amount of time for metal flow to develop because his answer related to the possible cause of the metal overflow rather than to the amount of time for it to occur. Neither the Claimant nor any other witness testified about the time period needed for metal flow to develop on stock rail. Plainly there is no basis for concluding

from the record in this case that 12 days are, or are not, a sufficient period of time for metal flow to be manifested in stock rail if it was not previously present.

Even on the assumption that the turnout in question had unusually worn switch points on December 19, 2009, that caused the derailment, the record does not support a finding that the switch points were unusually worn on December 7, 2009, when the Claimant inspected the switch. The Carrier has the burden of proof in the case. The only witness to testify who actually saw the condition of the switch points on December 7 was the Claimant. He testified that he inspected the switch on December 7, including throwing the switch, and that it had no FRA defects. It had no metal overflow, he stated, and the switch was not unusually worn.

Since the Carrier had no witness as to the condition of the switch on December 7, except for the Claimant, who denied the presence of any defect, the Carrier's case rests entirely on circumstantial evidence. In order to prevail on circumstantial evidence, the Carrier has the burden of establishing by substantial evidence that, contrary to the Claimant's contention, the switch points could not have deteriorated in the 12-day interval between the switch inspection and the derailment from a state of not being "unusually worn" to being "unusually worn." Based on the evidence in the record indicating that there was a significant amount of heavy traffic through the turnout and into the siding during the relevant period; the evidence that there were multiple days below freezing during that time; and the absence of any evidence that regardless of the amount of traffic and the weather conditions, 12 days were an insufficient period of time for switch points to change from a condition of not being "unusually worn" to being "unusually worn," the Board finds that the Carrier has not carried its burden of proof.

In addition to the weakness of the Carrier's case, there is also circumstantial

evidence in the record that supports the Claimant's case. First, former Roadmaster Earp, who supervised the Claimant during the relevant period, testified that the Claimant "was real good about passing on conditions." Second, on December 7, 2009, the date that the Claimant found no defect in his inspection of the Northeast Rose Hill switch, he found defects and took remedial action at two other switches he inspected: Southeast Dudley and Northeast Case Farms. This would indicate that the Claimant was being thorough and conscientious in his work and support the conclusion that there was no defect present that date at the Northeast Rose Hill switch, as he indicated on his report.

Third the fact that no derailment or any other problem occurred at the Northeast Rose Hill switch from December 7 until December 19, 2009, despite a considerable amount of heavy traffic over the switch during that period of time would also support an inference that the switch was not excessively worn on December 7th. In this connection it should be noted that when asked if there was something wrong with the switch, why no derailment occurred between December 7 and 19, Engineer of Track Parrish stated, "That I cannot answer." (Tr. 22). He did not state that there was little or no traffic over the switch during that period of time.

For the reasons stated above the claim will be sustained.

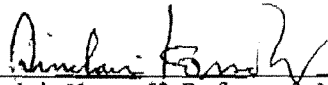
A W A R D

Claim sustained.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award

effective on or before 30 days following the date the signed Award is transmitted to the parties.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
May 17, 2010